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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, *Petitioner*

v.

EDWARD LEWIS FIELD and WALTER L. SHERFEY

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims in *Field* v. *United States* (Appendix A to Petition, 14) is reported at 158 F. Supp. 580. The opinion in *Sherfey* v. *United States* (Appendix B to Petition, 20) is reported at 157 F. Supp. 936.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether an officer of the Regular Army who had active military service prior to November 12, 1918, who was retired for physical disability prior to World War II, who was recalled to active duty in the Army in World War II, and who, following completion of his period of active service and return to inactive status on the Regular Army Retired List, has been paid retired pay under the Pay Readjustment Act of 1942, 56 Stat. 359, as amended, in an amount lower than 75 per cent of the active-duty pay to which he was entitled on his last day of active duty, is "hereafter retired under any provision of law" within the meaning of Paragraph 4, Section 15, Pay Readjustment Act of 1942, 56 Stat. 359, 368, so as to entitle him to receive retired pay computed at the rate of 75 per cent of his last active-duty pay.

STATUTE INVOLVED

The pertinent provisions of Paragraph 4, Section 15, Pay Readjustment Act of 1942, 56 Stat. 359, 368, are set forth in the Petition at p. 2.[1]

STATEMENT

The respondents, officers of the Regular Army retired for physical disability in the 1930's after long military careers which began in World War I, were

[1] Section 203(a) of the Act of June 29, 1948, 62 Stat. 1081, 1085, also set forth in the Petition at p. 2, is wholly inapplicable. See Argument, pp. 10-12, *infra*.

after some years of service on the Regular Army Retired List, recalled to active duty prior to the Japanese attack on Pearl Harbor. Petition, 15, 22. Each respondent, while on active duty, received active-duty pay computed upon the basis of all his service in the Army. *Ibid.*

Respondent Field was returned to inactive status on the Regular Army Retired List on October 16, 1946, at which time he was in receipt of the active-duty pay and allowances of a colonel with over 28 years' service. From October 17, 1946, to June 28, 1948, he received retired pay only at the rate of 75 per cent of the active-duty pay of a captain with over 23 years' service.[2] From June 29, 1948, to date, he has been paid retired pay at the rate of 75 per cent of the active-duty pay of a lieutenant colonel with over 23 years' service. Petition, 15.[3]

Respondent Sherfey was returned to inactive status on the Regular Army Retired List July 31, 1948, at which time he was in receipt of the active-duty pay and allowances of a lieutenant colonel with over 30 years' service. From August 1, 1948, he has been paid retired pay only at the rate of 75 per cent of the active-duty pay of a lieutenant colonel with over 23 years' service.[4]

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[2] Respondent Field's original retirement in 1935 had been in the grade of captain. As of October, 1946, he had completed a total of over 28 years' service in the Army and of over 23 years' active service. Petition, 3.

[3] This apparently resulted from the Army's belief that Section 203(a) of the Act of June 29, 1948, *supra*, was applicable to him. Petition, 15 (fn. 2).

[4] As of July 31, 1948, respondent Sherfey had completed a total of over 30 years' service in the Army and of over 23 years' active service. His original retirement in 1932 had been in a grade lower

Each respondent brought suit in the United States Court of Claims to recover the difference between retired pay at the rate of 75 per cent of his last active-duty pay and that which he had been paid for the six years next preceding the filing of his petition in that Court. The Court of Claims held, in opinions rendered January 15, 1958, upon all parties' motions for summary judgment, that the respondents were "hereafter retired" within the meaning of Paragraph 4, Section 15, Pay Readjustment Act of 1942, *supra*, as that statute had theretofore been interpreted[5] and, therefore, that each respondent was entitled to the difference between the retired pay he had been paid and retired pay at the rate of 75 per cent of his last active-duty pay. The court, accordingly, granted respondents' motions for summary judgment.

ARGUMENT

The issue in the present case is singularly narrow, as the petitioner indeed admits (Petition, 5), and no amount of mathematical legerdemain suffices to convert it into one warranting review by this Court on certiorari. The decisions below apply to an unascertainable but small and ever-diminishing fraction of the retired officers of the Regular Army. Specifically, the ones affected are only those Regular Army officers who served in the armed forces of the United States prior to November 12, 1918; who were retired for physical disability between World Wars I and II; who were again called upon to perform active service in the

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than lieutenant colonel, but again the Army apparently considered Section 203(a) of the Act of June 29, 1948, *supra*, applicable to him. Petition, 22.

[5] *Gordon* v. *United States*, 134 C. Cls. 840 (1956); *The Equitable Trust Company, et al.* v. *United States*, 155 F. Supp. 749 (Ct. Cls. 1957).

Army in World War II; and who, upon the completion of that active service, have been paid retired pay amounting to less than 75 per cent of their last active-duty pay.

If, however, the decisions of the Court of Claims should seem to be of broad importance in any aspect, they are manifestly correct. They reflect a clear and long-standing policy of Congress to reward a handful of Regular Army officers retired for disability whose service in our nation's armed forces encompasses both World Wars. The result of the decisions below is in complete harmony with the letter, spirit and purposes of the Pay Readjustment Act of 1942.[6] Patently, there is here no important question requiring decision by this Court.

I.

The Decision Presents No Issue of General Importance

The main thrust of the petitioner's argument appears to be that the decisions below impose enormous liability upon the United States (Petition, 5, 12). To buttress this familiar assertion, the petitioner represents that the firm adherence of the Court of Claims in these cases to its prior holdings[7] results in discrimi-

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[6] The petitioner represents that at the time of the passage of the 1942 Act, Regular Army officers with World War I service retired for length of service received less than "75% of active-duty pay" (Petition, 7). This is not the fact. See Section 3, Act of June 13, 1940, 54 Stat. 379, 380, amending Section 5, Act of July 31, 1935, 49 Stat. 505, 507.

[7] *Gordon* v. *United States*, 134 C. Cls. 840 (1956); *The Equitable Trust Company, et al.* v. *United States*, 155 F. Supp. 749 (C. Cls. 1957); see also *Seliga* v. *United States*, 137 C. Cls. 710 (1957); *Travis* v. *United States*, 137 C. Cls. 148 (1956); *Bailey* v. *United States*, 134 C. Cls. 471 (1956); *Danielson* v. *United States*, 121 C. Cls. 533 (1952); *Shea* v. *United States*, 119 C. Cls. 53 (1951); *Carroll* v. *United States*, 117 C. Cls. 53 (1948).

natory distortion of a supposed statutory relationship between the retired pay of military personnel continuously on active duty between World War I and II and those whose "civilian activities" during these years were interrupted by the outbreak of World War II. The petitioner concludes that this Court should act to remove the anomalies and inequities thereby created.

Obviously, the petitioner's mere references to frustration of consistent Congressional policy and discrimination do not serve to create an important Federal question. The fact, of course, is that the incidents of military retirement, and particularly of retirement pay, vary in literally hundreds of respects. The attempt to create from this alone the spectre of grave injustice which the petitioner apparently would present to the Court is absurd. It cannot seriously be suggested that Congress has ever intentionally discriminated either for or against a particular group of veterans of military service. That Congress, in the fourth paragraph of Section 15 of the Pay Readjustment Act of 1942, did announce a policy of rewarding in some small measure those officers who have served the nation honorably and well in two World Wars, and who, moreover, have met the stringent statutory criterion of total and permanent disability incident to that service, can scarcely be termed discrimination.

It is universally recognized that the entire field of military pay legislation is highly technical, intricate and involved, resulting, to the unpracticed eye, in some apparent anomalies. Some might consider it iniquitous that a Regular Army or Reserve colonel with 10 years' inactive service and 20 years' active duty may retire for longevity with precisely the same retired

pay he would receive had all his service been active: viz., 75 per cent of the basic pay of a colonel with over 30 years' service.[8] Others might find inequity in the fact that a colonel of the National Guard or Army Reserve with World War I service, five years' active duty and 25 years' inactive service in the Guard or Reserve, should receive the same retired pay if retired for physical disability of 30 per cent as if his entire military service had been on active duty in the Regular Army; again, 75 per cent of the basic pay of a colonel with over 30 years' service.[9] The overall answer is merely to repeat respondents' first premise—that military pay legislation is complicated and technical, and each provision of it must be construed within its own frame of reference.

Several salient facts do stand forth, however. The most immediately apparent is that petitioner's insistence upon the unique importance of active duty time, with its corollary disparagement of any service other than active, is without support in the law. It is manifest that in each instance the amount of retired pay to which any military person is entitled is no more, and

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[8] Section 5, Act of July 31, 1935, 49 Stat. 505, 507, as amended, 10 USC (1952 ed.) § 971(b).

[9] *See Tracy* v. *United States*, 136 C. Cls. 211 (1956); *Lowell* v. *United States*, 158 F. Supp. 704 (C. Cls. 1958) (Opinion by Mr. Justice Reed, Retired, sitting by designation). It should be remembered that much, if not most, military pay legislation is initially prompted, and usually drafted, by the military services themselves. For example, the Act of August 10, 1956, 70A Stat. 1, *et seq.*, revising, codifying, and enacting into law Titles 10 and 32 of the United States Code, was prepared by groups within the military establishment in "liaison" with the Congress. Senate Report No. 2484, 84th Congress, 2d Session, pp. 14-15. See also *A Manual for Drafting Federal Legislation*, 11 Fed. Bar Jour. 238 (1951).

no less, than that provided by statute. Whether that amount of retired pay is based only on active duty, or on a total of all service, turns only on the words of the applicable statute or statutes. Finally, and most pertinent here, there simply is not, nor has there ever been, any balancing or adjustment of military officers' pay, active or retired, solely on the basis of their *age*, as petitioner would have the Court believe. Petition, 7. Petitioner concedes, as of course it must, that Congress intended that World War I officers retired prior to Pearl Harbor should, if they returned to active duty thereafter, have full credit for longevity purposes while on active duty for their time on the Retired List. Petitioner has delved deep, and unsuccessfully, to discover some basis for its theory that Congress should then choose to deny the same officers the same credit for the same service in computing their retired pay. If the decisions below which have effectuated the clear intent of Congress should extend any disparate relationships in this field, and this respondents deny, it nevertheless would not be a matter of sufficient import to merit this Court's attention.

The petitioner alludes generally to some 2,600 retired officers, all ostensibly potential claimants, with liability perhaps running into many millions of dollars. In view of the omission of any authority for these elusive and illusory representations, the respondents are handicapped in testing the petitioner's statements as the Court will be in weighing them. Accepting, *arguendo*, both the bare assertion that 2,600 retired officers[10] were called to active duty between 1940 and

[10] The petitioner neglects to inform the Court whether these were all officers of the Army, and indeed even whether they were all members of a Regular component of the armed forces.

1946, and the soundness of the petitioner's assumptions in computing a so-called average recovery (Petition, 12), it is still necessary to measure the assertion and assumptions in the light of reality: assuredly not all, and probably not even most, retired officers recalled to active duty in World War II had World War I service; irrespective of World War I service, not all so recalled were retired for physical disability; and not all so recalled have been paid less than 75 per cent of their last active-duty pay. By any criteria, the petitioner's estimate of the amounts involved is grossly exaggerated.[11]

In any event, Congress, despite more than one opportunity to demonstrate concern over what the petitioner decries as the enormous and unjustified liability imposed upon it by the Court of Claims, has instead shown remarkable tolerance to the decisions.[12] Whether this is attributable to the fact that the benefits flowing from the decisions below accrue only to those few re-

[11] Petitioner's reference to the General Accounting Office statute of limitations is interesting but inconsequential. That Office not being bound by judicial decisions (31 Comp. Gen. 73 (1951)), it can, and frequently does, decline to follow them. *See, e.g.*, 36 Comp. Gen. 628 (1957); 37 Comp. Gen. 31 (1957); Comp Gen. Dec. B-130797, April 1, 1957 (*Gordon* v. *United States*, 134 C. Cls. 840 (1956) will *not* be followed by the General Accounting Office).

[12] The Act of August 10, 1956, *supra*, a comprehensive revision of the laws relating to the armed forces, became law some months after the decision of the Court of Claims in *Gordon* v. *United States*, 134 C. Cls. 840 (1956), construed below as controlling. The Act of May 20, 1958, Public Law 422, 85th Congress, 2d Session, a comprehensive military pay bill following extensive studies by, *inter alia*, the Cordiner Committee, had not been signed by the President at the time of the filing of the Petition. Neither reflects any concern whatsoever with any unfair effect of the decisions below.

maining Regular retired officers whose service in the armed forces dates back nearly 40 years, or to the fact that the decisions below are in strict consonance with the intent and purpose of the Congress, it is apparent that a quite narrow question of minor import is here presented.

II.

The Decisions Below Are Clearly Correct

Upon a thorough study of the language of the statute, the history and purposes of its enactment, and prior decisions construing it,[13] the Court of Claims properly concluded that the respondents were "hereafter retired" within the meaning of paragraph 4, Section 15, Pay Readjustment Act of 1942, 56 Stat. 359, 368, and, therefore, entitled to retired pay computed at the rate of 75 per cent of their last active-duty pay.

As the respondents understand it, the petitioner does not assert that paragraph 4, Section 15, Pay Readjustment Act of 1942, fairly viewed, is incapable of supporting the meaning assigned to it below. What the petitioner apparently does argue is that Section 203 (a), Act of June 29, 1948, 62 Stat. 1081, 1085, somehow operates to deprive officers, who would *otherwise* qualify, of the benefits of the 1942 Act. Petition, 10.[14] In effect, the petitioner asks this Court, as it did the

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[13] *Gordon* v. *United States*, 134 C. Cls. 840 (1956); *The Equitable Trust Company, et al.* v. *United States*, 155 F. Supp. 749 (C. Cls. 1957); *Danielson* v. *United States*, 121 C. Cls. 533 (1952); *Shea* v. *United States*, 119 C. Cls. 53 (1951); *Carroll* v. *United States*, 117 C. Cls. 53 (1948).

[14] This is consistent both with the petitioner's explanation of its failure to apply for certiorari in *Gordon* and the Government's contentions below (Petition, 16-17, 23-24).

Court of Claims, to construe Section 203(a) of the 1948 Act as rendering meaningless, ostensibly through repeal by implication, both the fourth paragraph of Section 15 of the Pay Readjustment Act of 1942 and the saving provisions of Section 205(b) of the Act of June 29, 1948, 62 Stat. 1081, 1085. The petitioner's contention as to the purpose and effect of Section 203(a) should be rejected for this reason alone. Moreover, Section 205(a) provides, in explicit terms, that nothing contained in any part of Title II of the Act of June 29, 1948, "shall be construed to deprive any person of * * * greater retired or retirement pay to which he or she may be entitled under any other provision of law * * *." That the 1942 Act is another such provision of law cannot seriously be doubted. And, just as assuredly, it was not repealed by implication upon the enactment of Section 203(a).[15]

The fallacy in the petitioner's approach lies in its attempt to apply a "clear and specific prohibition" of a totally inapposite enactment, absent any recognition of another clearly applicable provision of law which affects only those few remaining officers with World War I service, recalled from disability retirement to active duty in World War II. The decisions below correctly reject this sort of argument and recognize and accord proper meaning to the controlling provision of the law.

In enacting the fourth paragraph of Section 15, Pay Readjustment Act of 1942, Congress intended to and did make a distinction between retired officers on inactive status and those who "were not drawing retired

[15] Section 531(b)(34), Act of October 12, 1949, 63 Stat. 802, 839; *Lowell* v. *United States*, *supra*.

pay because they had been recalled to active duty and were then drawing active-duty pay." *Danielson* v. *United States*, 121 C. Cls. 533, 545 (1952); see also *Gordon* v. *United States*, 134 C. Cls. 840 (1956). In enacting Section 203(a) of the Act of June 29, 1948, the respondents submit that Congress did not intend to, and did not, repudiate that distinction.[16]

The petitioner's final criticism of the decisions below is that the Court of Claims has conferred on the respondents as officers "hereafter retired" within the meaning of the statute a great preferment over brother officers whose service was uninterrupted by physical disability. Even if all suppositions made in an attempt to buttress this assertion were accurate,[17] it would be a complete answer to say that not the court below, but Congress, is responsible.

In closing, the respondents say that the decisions of the Court of Claims in these and similar cases are plainly in consonance with the honorable and long-standing policy of Congress to compensate, to the extent that money can do so, those officers of our Regular Army called from disability retirement to assume, for the second time in a world conflict, responsibility for the defense of our nation and liberties. The fact that now, long years after, those few still living are about

[16] Section 203(a) has been the source of many benefits to officers not entitled to special consideration because of World War I service. Those who derive benefits from it are, of course, also subject to the restrictive provisions here relied on by the petitioner.

[17] All question of promotion opportunities and active-duty pay and allowances as compared with retired pay aside, to say that officers who have become totally and permanently incapacitated in the military service have thereafter "very likely been lucratively employed in the civilian world" (Petition, 12) is sheer sophistry.

to receive their rightful due is neither anomalous nor inequitable to the petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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